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No. 90-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a not-for-profit corporation, and LARRY KATZENSTEIN and JOYCE ARMSTRONG, as representatives of AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Petitioners,

vs.

B. STEPHEN MILLER, III,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' federal preemption claim is not properly before this Court because that claim was neither pressed nor passed upon in the courts of Missouri. In the Missouri Supreme Court, petitioners' principal argument was simply that, as a matter of state law, the circumstances of this case should not be deemed to fall within the prohibitions against fee sharing imposed by the public policy of Missouri, Mo. Rev. Stat. § 484.150 (1986), and Disciplinary Rule 3-102 of the Missouri Code of Professional Responsibility.

The only federal question ever raised in or decided by the courts of Missouri, and hence, the only one petitioners can advance here, is whether Missouri's prohibitions against fee sharing, as applied by the courts of Missouri to prevent petitioners from dividing court-awarded attorney fees with their former staff counsel, deprived petitioners of their rights under the First Amendment to the United States Constitution, where there was no genuine issue of material fact that:

(a) petitioners are both lay organizations which are independent and autonomous of the national ACLU, they are not legal aid offices or legal services agencies, they sponsor little litigation, they do not depend on attorney fee awards to support their activities, and, aside from respondent, they have never employed a staff counsel or sought to employ one;

(b) contrary to the practice and recommendation of the national ACLU, petitioners maintained no separate or segregated legal fund for litigation activities, but instead commingled what attorney fees they recovered in litigation with their general revenues, which were under the exclusive control of nonlawyers and which could be used to meet their general operating expenses;

(c) petitioners placed respondent under the direct supervision and control of their executive director, a lay person, and they

asserted, or reserved the authority to assert, actual control over the minimal litigation they did sponsor, including the litigation that gave rise to the fees at issue here;

(d) the legal fees sought by petitioners were awarded to respondent for legal services which he rendered on behalf of a third party, no portion of those fees was awarded for legal services performed by or on behalf of petitioners, and petitioners were not parties to the litigation which generated the fees; and

(e) petitioners recovered all costs they had advanced in the case which gave rise to the disputed fees, rejected respondent's express written offer to reimburse them for a proportional share of his salary and overhead attributable to that case, and instead sued respondent for the full fee award he had received, which was based on the market value of his services, not the actual amount he was paid by his employer.

PARTIES

Although petitioners identify themselves as "affiliates" of the national ACLU, they are, in fact, independent and autonomous of that organization. The national ACLU, incorporated in the state of New York, is not registered to do business in the state of Missouri, the jurisdiction from which this case arises. It played no role directly or indirectly in this case, or the events leading to this case, and is not bound by any judgments entered, or which may be entered, herein.

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BRIEF IN OPPOSITION

STATEMENT UNDER RULE 29.4(c)

Because this proceeding draws into question the constitutionality of Mo. Rev. Stat. § 484.150 (1986), a statute of the State of Missouri affecting the public interest, and neither the State of Missouri nor any agency, officer, or employee thereof is a party, petitioners should have noted in their petition for certiorari that 28 U.S.C. § 2403(b) may be applicable. They did not do so, and they have failed to serve a copy of their petition on the Attorney General of Missouri as required by Rule 29.4(c) of this Court.

STATEMENT OF THE CASE

The case now before the Court represents the culmination of an ongoing conflict between respondent and petitioners regarding the extent of lay control over the position of ACLU/EM staff counsel, a position which no longer exists and which has not existed since the summer of 1985. At issue is the disposition of $ 8,090.25 in attorney fees previously awarded to respondent by the United States District Court for the Eastern District of Missouri in a case styled *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3). The dispute over those fees was decided by the courts of Missouri on cross-motions for summary judgment. Respondent ultimately prevailed in both the Missouri Court of Appeals and the Missouri Supreme Court. The basic details of the case are set forth in the Missouri Supreme Court's opinion.[1] However, that court's decision was informed by a number of undisputed facts which either do not appear in the opinion itself or which were mentioned only in passing. Those facts shall be reviewed in more detail here.

Between 1982 and 1985, respondent was employed as staff counsel for the ACLU/EM (Miller Affidavit ¶ 3, L.F. 18), an unincorporated membership association which has no tax-exempt status under federal law. (Miller Affidavit ¶ 5, L.F. 19); see also Plaintiffs' Second Amended Petition ¶ 1, L.F. 72.) The ACLU/EM and the American Civil Liberties Union/Eastern Missouri Fund (the Fund), the other petitioner in this proceeding, are separate entities. (Answer No. 11(c) to Defendant's Interrogatories to Plaintiffs, L.F. 116; Plaintiffs' Second Amended Petition ¶ 1, L.F. 72.) Respondent has never been employed by the Fund,

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[1] Petitioners' statement of the case and their argument draw extensively from the dissenting opinion of Chief Justice Charles Blackmar. Justice Blackmar's opinion is rife with error, and his interpretation of the facts and law has not been accepted by any other judge who has considered the case on appeal.

nor has he ever entered into any contracts or other agreements with the Fund which purported to obligate him to pay it sums which he received as attorney fees for legal services rendered by him to third persons. (Miller Affidavit ¶ 4, L.F. 18-19.)

Like the Fund, the ACLU/EM is a lay organization. (Miller Affidavit ¶ 11, L.F. 20.) The majority of the ACLU/EM's members are not lawyers. It is governed by a board of directors whose members, with a few exceptions, are also nonlawyers. (Miller Affidavit ¶ 5, L.F. 19.) During the majority of respondent's tenure with the ACLU/EM, its president was not a lawyer. (Miller Affidavit ¶ 6, L.F. 19.)

The ACLU/EM employs an executive director who is in charge of its day-to-day operations. At all times relevant to this dispute, the executive director was Joyce Armstrong. Armstrong is not a licensed attorney or a law school graduate. (Miller Affidavit ¶ 7, L.F. 19; Answer No. 10 to Defendant's Interrogatories to Plaintiffs, L.F. 115.) At the time respondent worked as ACLU/EM staff counsel, Armstrong was his superior. Armstrong was authorized by the ACLU/EM board to exercise direct supervision and control over respondent's work, and she exercised that authority. (Miller Affidavit ¶ 8, L.F. 19; Miller Deposition, p. 50; Defendant's Deposition Exhibit A, p. A-4.)

Neither the Fund nor the ACLU/EM is a legal services agency. (Reply to Defendant's Counterclaim ¶ 2, L.F. 123; Miller Affidavit ¶ 11, L.F. 20.) Although respondent was employed by the ACLU/EM as staff counsel, much of his time was spent on activities which did not involve him in litigation. He had numerous administrative and clerical responsibilities. He made public appearances on behalf of the association, worked on legislation, and engaged in lobbying. (Miller Deposition, pp. 13-18; Defendant's Deposition Exhibit A, pp. A-3 - A-4.) Respondent was actually discouraged by the executive director from spending as much time as he did on litigation (Miller Deposition, pp. 53-54, 56), and at the time he left the ACLU/EM's employ,

proposals were pending which would have limited his involvement in litigation even further. (Miller Deposition, p. 82.)

The ACLU/EM maintained no separate legal department and employed no other attorneys on its staff at the time respondent worked there. (Miller Affidavit ¶ 9, L.F. 19.) Prior to respondent's employment as staff counsel, the ACLU/EM had no attorneys on its payroll. Subsequent to respondent's departure, the ACLU/EM hired no one to take his place as staff counsel (Miller Affidavit ¶ 10, L.F. 19), and petitioners have not claimed that they might now wish to hire another staff counsel at some point in the future.

From time to time the ACLU/EM does advance costs and pay expenses to support litigation brought by individuals who claim that their constitutional rights have been violated. The Fund, in turn, provides money to the ACLU/EM to help defray those costs and expenses. (Answer Nos. 25(a), (b), (c) to Defendant's Interrogatories to Plaintiffs, L.F. 116.) Nevertheless, the funding of such litigation represents a small fraction of their activities. Neither the ACLU/EM nor the Fund depends on attorney fee awards to support its activities. (Miller Affidavit ¶ 11, L.F. 20.)

The ACLU/EM had no segregated or separate fund or bank account to pay for litigation costs and expenses. The monies to pay those costs and expenses were drawn from the association's general funds or from the general funds of the Fund contained in their general bank accounts. The compensation paid to respondent by the ACLU/EM likewise came from the association's general funds, not from any segregated or separate litigation fund. (Miller Affidavit¶ 15, L.F. 21.) The only sense in which a litigation fund was maintained by petitioners was that their account books included a ledger sheet account for litigation expenses denominated as the "case budget account." (Miller Affidavit ¶ 16, L.F. 21.)

In cases where the ACLU/EM decided to provide funding for costs and expenses, the association would solicit a private

attorney to provide representation to the litigant whose position it supported. When respondent served as staff counsel, he also entered his appearance in the case as co-counsel, along with the private attorney, who was known as the "cooperating attorney." (Miller Affidavit ¶13, L.F. 20.) Respondents, however, did not give the attorneys a free hand over the litigation they sponsored. As previously noted, the ACLU/EM board expressly authorized the lay executive director to exercise direct supervision and control over respondent, the staff attorney, and she exercised that control. (Miller Affidavit ¶ 8, L.F. 19; Miller Deposition, p. 50; Defendant's Deposition Exhibit A, p. A-4.) On at least one occasion, the executive director actually undertook to negotiate a settlement of a pending case with the opposing side and their attorney. (Miller Affidavit ¶ 44, L.F. 28; Miller Deposition, p. 49; L.F. 33-35.)

In addition, only the lay executive director and the lay treasurer had authority to issue checks to pay for litigation expenses, and litigation costs and expenses in excess of $500 required the lay executive director's express prior approval. (Miller Affidavit ¶¶ 18-21, L.F. 21-22.) The ACLU/EM board exercised the right to reject settlement offers, even where settlement was recommended by counsel for the client. (Miller Affidavit ¶ 46, L.F. 29; Miller Deposition, p. 50.) The ACLU/EM also expressly reserved the right to terminate support for a case at any time if representation of a client's interests required taking an "anti-civil liberties position" or a "conflict of interest arose" (Plaintiffs' Deposition Exhibit 3 at 3-2), and it did, in fact, exercise that right at least once when it disagreed with counsel and the clients as to how the case should be handled. (Miller Affidavit ¶ 47, L.F. 29.)

In cases sponsored by the ACLU/EM, attorney fees were sometimes awarded by the courts for professional services rendered by the particular lawyers who actually handled the litigation. Virtually all of these awards were made pursuant to 42 U.S.C. § 1988. (Miller Affidavit ¶ 22, L.F. 22.) Because the ACLU/EM was a lay organization and not a party to the litiga-

tion, it could not make a claim for such attorney fees in its own name, and, during respondent's tenure as ACLU/EM staff counsel, it made no such claims. Without exception, attorney fees were paid directly to the individual attorneys who earned them. (Miller Affidavit ¶ 23, L.F. 22; Miller Deposition, pp. 21, 39-41.)

Prior to 1984, the ACLU/EM had no formal, written policy regarding the distribution of court-awarded attorney fees awarded to its staff counsel for professional services rendered by him on behalf of individual clients in cases for which the ACLU/EM had advanced litigation costs and expenses. Cooperating attorneys, however, were expected to turn over to the association all court-awarded attorney fees which they received in such cases. (Miller Affidavit ¶ 24, L.F. 22-23.) After he began working for the ACLU/EM, respondent understood that the association likewise expected him to surrender to it any court-awarded fees he received. (Miller Deposition, p. 20.)

In mid-1984, the ACLU/EM adopted a new policy regarding the disposition of court awarded attorney fees received by its staff counsel and by cooperating attorneys. That policy provided that staff attorneys "are encouraged to apply for and receive court-awarded fees to be paid by opposing parties, and all such fee awards are to be paid immediately over to the ACLU/EM." The policy further provided that any such fee awards obtained by cooperating attorneys normally had to be split 50-50 with the association. (Miller Affidavit ¶ 25, L.F. 23; Plaintiffs' Deposition Exhibit 13, section V., ¶¶ 2, 3, p. 13-3.)[2]

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[2] Responsibility for analyzing any legal problems with the new policy was assumed by St. Louis University Law School Professor Mike Wolff, the chairman of the ACLU/EM committee charged with revising the attorney fee policy. Wolff represented that there were no problems with the new policy. (Miller Deposition, pp. 75-77.) He failed to disclose to the committee or to respondent that the policy might be illegal or in contravention of the canons of ethics. (Miller Affidavit ¶ 26, L.F. 23.) His report to the ACLU/EM did not even address the subject. (Plaintiffs' Deposition Exhibit 12.)

Between 1982 and 1987, court-awarded fees were received by attorneys in seven cases in which the ACLU/EM had contributed money for costs and expenses. (Answer Nos. 25(a), (b), (c) to Defendant's Interrogatories to Plaintiffs, L.F. 116-17.) By far the largest single fee award, approximately $70,000, was made in *Burks v. Teasdale*. (Armstrong Deposition, p. 78.) All of this money was retained by the lawyer in the case. (Armstrong Deposition, p. 51.) In two instances, *Stokes v. Wyrick* and *Young v. Whaley*, all of the fees ($635.55) were paid over to the ACLU/EM by counsel. In three cases, the attorneys who had been awarded the fees and received payment divided the fee awards with the ACLU/EM. The remaining case, *D.C. and M.S. v. City of St. Louis*, is the proceeding which gave rise to this litigation, and it shall be discussed more fully below. In all of these cases except *Young v. Whaley*, the ACLU/EM received additional amounts for the costs and expenses it had advanced, above and beyond whatever share of the attorney fees it was given. (Answer Nos. 25(a), (b), (c) to Defendant's Interrogatories, L.F. 116-17.) Out of the monies so received, the ACLU/EM apparently then reimbursed the Fund for whatever money the Fund had advanced to it to defray the costs and expenses of the litigation. (*Id.*; Motion of Plaintiffs for Summary Judgment ¶ 4, L.F. 55.)

All court-awarded attorney fees which were paid over to the ACLU/EM under the aforementioned policies, both before and after 1984, were deposited in the association's general bank accounts or in the general bank accounts of the Fund. They were not deposited in any separate or segregated account or fund. The use of the fees so received was not restricted to litigation purposes. Rather, the fees were considered to be part of the organizations' general revenues and could be used to defray the organizations' general expenses. (Miller Affidavit ¶ 27, L.F. 23-24.)

Although the ACLU/EM is affiliated with the national ACLU in New York, the two organizations are autonomous and independent of one another. (Miller Affidavit ¶ 29, L.F. 24.) Unlike the ACLU/EM, the national ACLU maintains a separate legal department headed by a legal director who is an attorney. In addition, the national ACLU does have an express policy which requires that all attorney fees paid over to the ACLU by its staff counsel and cooperating attorneys be placed in a segregated account known as the "ACLU and ACLU Foundation Attorneys Fees Litigation Fund" and used "solely to support litigation and litigation-related activities." Although the national ACLU recommended that its affiliates establish similar litigation funds, neither the ACLU/EM nor the Fund established such a fund during respondent's tenure as staff counsel, and no such fund existed at the time the fees at issue in this case were awarded or paid. (Miller Affidavit ¶ 30, L.F. 24.)

Between 1984 and 1985, when he resigned from the ACLU/EM to begin work for the Illinois Appellate Court, respondent appeared as counsel of record in a case styled *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3) (U.S. District Court, E.D. Mo.). At the conclusion of that case, respondent and his co-counsel, Arlene Zarembka, applied for an award of attorney fees and costs pursuant to 42 U.S.C. §1988. The fee application and respondent's supporting affidavit indicated that respondent was employed as ACLU/EM staff counsel, but those documents did not purport to be submitted by or on behalf of either the ACLU/EM or the Fund. (See Plaintiffs' Deposition Exhibits 6 and 7.) Respondent's affidavit in support of the fee application specifically stated: "I am seeking compensation for myself at the rate of $75.00 per hour . . ." (Plaintiffs' Deposition Exhibit 7, p. 7-4, ¶ 10.)

After the fee application was submitted, respondent was required to withdraw his appearance in the case because his new job precluded him from appearing in court. (Miller Deposition, p. 94.) Following respondent's withdrawal, the U. S. District

Court granted the application, awarding $ 8,090.25 for the work performed by respondent. Notice of the award was made by the court to Arlene Zarembka, who remained counsel of record for the client, D.C., and Zarembka notified D.C. of the court's decision. (Miller Deposition, p. 37.)

Although the award was nominally made in the name of D.C., petitioners admitted in the circuit court that the effect of the court's order was to award the fees to respondent. In paragraph 7 of their motion for summary judgment petitioners expressly stated that "On September 25, 1985, the District Court awarded *defendant Miller* an attorney's fee of $ 8,090.25." (Emphasis supplied.) (L.F. 56.) That motion was verified and contained the oath of Alan Kohn, who swore that "all of the facts stated in this Motion are true and are based on undisputed evidence referenced in the Motion and contained in the record in this case." (L.F. 58.) Similarly, in their *Memorandum in Support of Plaintiff's [sic] Motion for Summary Judgment*, petitioners admitted that it was "defendant Miller" who applied for the fees (L.F. 59) and that "the Court awarded *defendant Miller* $ 8,090.25 in attorney fees." (Emphasis supplied.) (L.F. 60.)[3] The $ 8,090.25 awarded to

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[3] In the trial court, petitioners also suggested that because the ACLU/EM employed respondent at the time the fees were earned, the fee award should be deemed to have been made to it. (*Memorandum in Support of Plaintiff's [sic] Motion for Summary Judgment* at 4-6, L.F. 62-64). The problem with this theory is that it would have placed the ACLU/EM in violation of the Missouri statute prohibiting the unauthorized practice of law, Mo. Rev. Stat. § 484.020.2 (1986), and it was quickly abandoned.

In its place, petitioners argued for the first time on appeal that the fee award was actually made to respondent's client, D.C. They made this argument even though D.C. never claimed the fees himself and was not joined, or sought to be joined by petitioners, as a party in the case. In its opinion, the Missouri Supreme Court found this new theory to be unavailing. Appendix to *Petition for Writ of Certiorari* at A-7, fn. 4. ("[I]t is manifestly clear that the award is intended to compensate the attorney representing [D.C.] . . .")

respondent by the court represented compensation for 107.87 hours of work at respondent's market fee rate of $75 per hour. (Plaintiffs' Deposition Exhibit 8, p. 8-7.) It was not based on his actual rate of pay, which was only approximately $10 per hour.

Before the order awarding respondent the fees was entered, respondent learned of certain court decisions and Missouri Bar Advisory Committee opinions concerning the prohibition against sharing attorney fees with lay persons which applied to respondent's situation. (Miller Deposition, pp. 33-34.) At the time, respondent was not looking for materials on this subject. He happened to discover them in the course of doing research regarding proposals which were being made at the ACLU/EM to redefine the responsibilities of its staff counsel. (Miller Deposition, p. 34.) Respondent first became aware of these matters during the summer of 1985. (Miller Deposition, p. 107.)

Respondent discussed the materials he had found with Arlene Zarembka, his co-counsel in the *D.C. and M.S. v. City of St. Louis* case. Respondent and Zarembka concluded that turning their fee awards in that case over to the ACLU/EM in accordance with the association's fee policy would, in fact, be prohibited by the canons of ethics. (Miller Deposition , p. 33.) Even before they had received payment of the fees, they conveyed this conclusion to the ACLU/EM (Plaintiffs' Deposition Exhibits 9 and 10; Miller Deposition, p. 62) in an effort "to be open and honest about what [their] concerns were and what [they] thought the problems were" (Miller Deposition, p. 62). Although respondent advised the ACLU/EM that he could not turn over to it the $ 8,090.25 in fees he had been awarded because doing so would be illegal under Missouri law and would contravene the canons of ethics (Miller Affidavit ¶ 36, L.F. 26), he did make a written offer to the ACLU/EM to reimburse it for a proportional share of his salary, plus overhead attributable to the case. This offer was refused. (Miller Affidavit ¶ 50, L.F. 30.)

During the period prior to payment of the fee award, respondent also retained counsel to advise him on the matter. On the recommendation of his attorney, respondent contacted the attorney for the defendants in *D.C. and M.S. v. City of St. Louis*, Judith Ronzio. (Miller Deposition, p. 39.) Respondent's discussion with Ms. Ronzio concerned only how the checks for the fees and costs should be made payable as between respondent, his co-counsel, and the ACLU/EM, given the problem of improper fee sharing. Respondent informed Ms. Ronzio of the ethical problems posed by the division of the fee awards in the case and requested that the City issue three separate checks, one to Arlene Zarembka for her share of the fees, one to respondent for his share, and one to the ACLU/EM for the costs and expenses it had advanced in the case. (Miller Deposition, p. 39.)[4]

In December of 1985, the City of St. Louis issued a check to respondent in his name alone for the $ 8,090.25 in fees awarded to him by the court in the D.C. case. (Miller Affidavit ¶ 34, L.F. 25.) At the same time, the ACLU/EM received full payment of the $ 2,729.79 in costs and expenses it had advanced in the case. (Miller Affidavit ¶ 31, L.F. 25.) Issuance of separate checks to respondent and the ACLU/EM was not, however, the result of respondent's prior discussion with Ms. Ronzio. Ms. Ronzio informed respondent that the checks had been issued before she could take any action on the matter one way or another. A check was issued to respondent in his name alone in the ordinary course of business according to the City's standard procedures. (Miller Affidavit ¶ 49, L.F. 30.)

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[4] After petitioner advised respondents that he would not engage in improper fee splitting, respondents also contacted Ms. Ronzio themselves. They did so without the knowledge or consent of D.C., they did not purport to be acting on D.C.'s behalf, and they never mentioned any contractual agreement they had with D.C. Citing only their "policy," they demanded that the fees be paid directly to petitioner the Fund. (Armstrong Deposition at 77.)

The City's procedures were in conformity with the practice followed at the time by the federal court which awarded the fees. Under that practice, the parties obligated to pay fee awards made under 42 U.S.C. § 1988 were required to pay them to the attorneys who had earned them, not the individual clients. At a later stage of the same case which generated the fees here, the U.S. District judge expressly so held. (Miller Deposition at 40-41.) This procedure also conformed with the Missouri attorney fee lien statute, Mo. Rev. Stat. § 484.130 (1986), which provides:

> "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

As soon as he received his check from the City, respondent turned all of the money over to his attorney for deposit in his attorney's client trust account. This happened on December 17, 1985. (Miller Affidavit ¶ 34, L.F. 25.) Two weeks later, on December 31, 1985, the Missouri Bar Advisory Committee issued an opinion, based on an inquiry drafted and submitted by the ACLU/EM's general counsel, which stated that "a staff attorney who is on salary to the American Civil Liberties Union and who is awarded attorneys fees cannot turn said fees over to the corporation." (Miller Affidavit ¶ 35, L.F. 26.) After this opinion was issued, neither the ACLU/EM nor the Fund contacted respondent or his attorney to make a claim for the $ 8,090.25 fee award, and respondent heard nothing further from those organizations until this suit was filed in 1987. (Miller Affidavit ¶ 37, L.F. 26.)

Arlene Zarembka, the other attorney for plaintiffs in the case of *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3) (U.S. District Court, E.D. Mo.) was also awarded attorney fees by the

court. She likewise refused to split her fee with the ACLU/EM or the Fund, although she was asked by those organizations to do so, and her refusal was based on the same considerations invoked by respondent. Ms. Zarembka's law firm subsequently made a charitable contribution of a portion of the fees to the ACLU/EM, but the amount so contributed was less than the full 50% claimed by the association. Nevertheless, the ACLU/EM and the Fund took no further action against Zarembka to recover the additional amounts they claimed she owed them. (Miller Affidavit ¶ 38, L.F. 26-27.)

In reliance on the failure of the ACLU/EM to pursue its claim against respondent or Ms. Zarembka after it had been fully apprised of that claim, and after a substantial period of time had passed, respondent believed that the matter had been dropped. His attorney ultimately returned the disputed fees to him from his client trust account (Miller Affidavit ¶ 39, L.F. 27; Miller Deposition, pp. 97-98), and respondent testified at his deposition that he paid tax on the fee award "on the assumption that no action would be taken and that . . . the money was [his]." (Miller Deposition, p. 103.) Following the trial court's ruling in 1989, the money was placed in a money market account in the joint names of counsel for petitioners and respondent. It remained there until the Missouri Supreme Court ruled in respondent's favor, at which time the parties agreed to transfer the money to the sole control of respondent's attorney until, *inter alia*, the proceedings before this court were concluded.

REASONS FOR DENYING THE WRIT

I. Petitioners are precluded from raising their preemption claim because that claim was not argued before or passed upon by the courts of Missouri.

Petitioners raised no federal preemption issue at any time in any fashion before any of the Missouri courts which have passed on this case. Nor was any preemption issue considered or decided, explicitly or implicitly, by the circuit court, the Missouri Court of Appeals, or the majority of the Missouri Supreme Court. The only mention of preemption anywhere below was in the dissenting opinion of Missouri's Chief Justice, who raised the matter *sua sponte*. Accordingly, the issue of preemption has not been properly presented for review by this Court and cannot be considered now. *Clark v. Jeter*, 486 U.S. 456, 459, 100 L.Ed.2d 465, 470 108 S.Ct. 1910, ____ (1988). (Preemption claim not "pressed or passed upon" in state court will not be decided on writ of certiorari.)[5]

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[5] Should the Court decide to deviate from this rule, petitioners' preemption claim must nevertheless be rejected. There can be no dispute that the regulation of the practice of law is a field traditionally occupied by the states. When a preemption question involves such matters, this Court begins its analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). Here, there is absolutely no indication that when Congress enacted 42 U.S.C. § 1988, it intended to supersede either the general power of the states to regulate attorneys, or their specific authority to restrict or prohibit fee sharing between lawyers and lay persons. Section 1988 is not addressed to any of these things. It controls only what a losing defendant must pay, *Venegas v. Mitchell*, 495 U.S. ___, 109 L.Ed.2d 74, 84, 110 S.Ct. ___ (1990), where a victim of a civil rights violation is represented by counsel, *Kay v. Ehrler*, 59 U.S.L.W. 4279 (U.S. April 16, 1991) (No. 90-79).

II. The decision of the Missouri Supreme Court is in full accord with the decision of every federal court which has directly considered state prohibitions against fee sharing in the context of federal fee shifting rules, and it does not conflict with the decisions of any other state.

In their Petition for Certiorari, petitioners contend that the decision of the Missouri Supreme Court is unprecedented and aberrational. This is completely wrong. State prohibitions on fee sharing have frequently been considered by the federal courts in the context of federal fee shifting rules, and the result has always been the same as that reached by the Missouri Supreme Court here. The federal courts of appeal have long held that organizations may directly recover full market court-awarded attorney fees (as were involved here) for work performed by their staff counsel on behalf of third persons only where those organizations are dedicated solely to litigation. *National Treasury Employees Union v. U. S. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). Petitioners here obviously do not meet this requirement. They are both lay organizations.

According to the federal courts, full market fee awards to lay organizations, even non-profit ones, are prohibited by the professsional canons against fee-splitting and aiding the unauthorized practice of law. *Id.* at 851-52. This rule (hereinafter referred to as the "*NTEU* rule" has been uniformly followed by the U. S. Court of Appeals for the District of Columbia, *see, e.g., Jordan v. U. S. Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982); *Munsey v. Federal Mine Safety and Health Review Commission*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom. Smitty Baker Coal Company, Inc. v. Federal Mine Safety and Health Review Commission*, 464 U.S. 851, 78 L.Ed.2d 149, 104 S.Ct. 163, and by the U. S. Circuit Court for the Federal Circuit, *see, e.g., Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189, 83 L.Ed.2d 965, 105 S.Ct. 958 (1985); *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986), *cert. denied sub*

nom. National Treasury Employees Union v. Horner, 484 U.S. 815, 98 L.Ed.2d 31, 108 S.Ct. 67 (1987); *PPG Industries v. Celanese Polymer Specialties Company*, 840 F.2d 1565, 1570 (Fed. Cir. 1988).

This rule, however, is not absolute. The court in *National Treasury Employees Union v. U. S. Department of the Treasury, supra,* indicated that the ordinary prohibition against full fee awards to lay organizations might be relieved if those fees were placed into a fund for the maintenance of legal services program. The rationale for such an exception is that such a distinct and separate legal services program would be the functional equivalent of a law firm, to which the ethical prohibitions against fee-splitting with lay organizations and encouraging lay persons or organizations to engage in the unauthorized practice of law would not apply. To invoke this exception, however, the lay organization would be required to demonstrate that all attorney fee awards it received would be paid into the legal program fund. No portion of the fee award could be diverted to use in supporting the the organization's general activities; all must be used exclusively for litigation. *Jordan v. U. S. Department of Justice, supra*, at 516 n. 14; *National Treasury Employees Union v. U. S. Department of the Treasury, supra* at 854-55. Correspondingly, all of the lay organization's legal work, including attorney salaries, witness fees, etc., would have to be paid entirely from the legal program fund. See *Goodrich v. Department of the Navy, supra*, at 1580.

The problem here is simply that petitioners are not the functional equivalent of a law firm, private, public or otherwise, and they meet none of the foregoing requirements. Moreover, petitioners have engaged in conduct which could be construed as the unauthorized practice of law (see Miller Affidavit ¶¶ 8, 18-21, 44-47, L.F. 19, 21-22, 28-29; Miller Deposition at 48-56), one of the very things the *National Treasury Employees Union* rule was designed to safeguard against. Under these circumstances, petitioners could still avail themselves of the fruits of the

federal fee shifting statute, but they were entitled only to be reimbursed for their actual financial outlays in the case at issue here. *National Treasury Employees Union, supra,* at 853. As noted by the Missouri Supreme Court, however, they have already been fully reimbursed for all of the costs and expenses they claimed in that case, they rejected an offer by respondent to reimburse them for a proportional share of his salary and overhead attributable to the case, and they abandoned any claim for such reimbursement in this litigation.

Petitioners' attempt to distinguish *National Treasury Employees Union v. U. S. Department of the Treausry* before the state courts was without foundation. Although *NTEU* involved a labor union, the court's decision expressly addressed its applicability to other types of organizations. The court made clear that the applicability of its holding turns not on whether an organization is profit-making or not-for-profit, nor does it turn on what the purposes of the organization are. The primary consideration is whether it is a lay organization or one devoted solely to litigation. *Id.* at 854-55.

Accordingly, the principles articulated in *NTEU* have been applied to various "public interest" organizations, not simply unions. *See, e.g., Jordan v. U. S. Department of Justice, supra,* which involved fee awards to the Institute for Public Representation at the Georgetown University Law Center; and *Wilderness Society v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974 *en banc), rev'd on other grounds sub nom. Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), a precursor to *NTEU*, which involved an award of fees to attorneys for the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth ("the [fee] award must go to counsel, rather than to the organizations which pay their salaries").

Although there are cases in which courts have awarded fees directly to the ACLU, *see, e.g., Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Howard v. Phelps*, 443 F. Supp. 374

(E.D. La. 1978), those cases pre-date the rule developed in *NTEU* and its progeny; they give no indication of how the particular ACLU units or affiliates involved were organized or operated; and they did not purport to decide or even consider the question of whether such payments might be illegal and unethical. They are of no value to petitioners here.

Since the advent of *NTEU* and *Jordan*, the requirements of those cases have actually been applied to the Nebraska affiliate of the ACLU by the advisory opinion committee of that state's bar association, and to the ACLU's Florida affiliate by the bar association there. Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1097 (1989). Petitioners have not cited, and respondent has not found, a single state court decision which has ruled in a way that conflicts with the decision of the Missouri Supreme Court here.

As indicated in the statement of the case, even the national ACLU has structured itself to comply with *NTEU*'s requirements and has recommended that its affiliates do likewise. It has adopted this structure without any apparent ill effect or complaint. A similar change would work no hardship on petitioners. To the contrary, Thomas Blumenthal, the ACLU/EM's president, has conceded publicly during the course of these appeals that the creation of the necessary legal fund would have no practical effect on the way the organization is set up now, and, in his words, "if that's what we have to do, we'll do it." St. Louis Post-Dispatch, June 18, 1990, section B, page 1.

III. The Missouri Supreme Court was clearly correct in rejecting petitioners' First Amendment claim.

Petitioners have never disputed that the legal and ethical prohibitions against fee splitting are valid, on their face, under the United States Constitution. In the courts of Missouri, petitioners contended only that those prohibitions, as applied to them, violate the First Amendment. This contention is completely

spurious. During four years of litigation this case has been considered in one way or another by some twenty judges, including the circuit judge, the three-judge panel of the Missouri Court of Appeals, the full Missouri Court of Appeals (who had to rule on petitioners' application for rehearing or transfer), and the seven members of the Missouri Supreme Court. Of these, only Chief Justice Blackmar has been able to articulate any reasons which support petitioners' cause of action. Not even Blackmar, however, could abide petitioners' First Amendment claim.

Indeed, petitioners' First Amendment claim fails even under the analysis advanced by one of their own counsel, Roy Simon, in his article *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1132 (1989). That analysis construes existing case law as holding that First Amendment protection should be extended to financial agreements between lawyers and public interest organizations whenever those arrangements are "integral" to the organization's purposes. According to petitioners' counsel, "[i]f fee-sharing agreements are integral to the litigation programs of public interest groups . . . then fee sharing arrangements fall within the protection of the First Amendment." *Id.* at 1121. Assuming, for the sake of argument, that this is so, no such claim can be made here.

Under the foregoing analysis, fee sharing between a staff attorney and the public interest organization that employs him would be regarded as "integral" to that organization only if the organization's protected purposes would be significantly frustrated if such fee sharing were disallowed. *Id.* at 1121 n. 298. Petitioners could make no such claim here. Nothing in the statutes or rules forbidding fee sharing prohibits petitioners from continuing to provide financial support to litigation brought by third parties in order to advance the organizations' political and ideological goals. Nor do those statutes and rules limit in any way the right of petitioners to obtain full reimbursement for the actual costs and expenses which they have so advanced, and they

have complete freedom to use the funds reimbursed to them for any purpose they so choose.

As the previous discussion has shown, the only consequence to petitioners of prohibiting them from sharing fees with their staff attorney would be to prevent them from recovering full market fees for the legal services which that attorney provided to third parties. The undisputed evidence established, however, that, with the exception of respondent, petitioners have never even employed a staff counsel (Miller Affidavit ¶10, L.F. 19); that respondent himself had only limited involvement in litigation during his tenure as staff counsel for the ACLU/EM, and at the time he left its employ proposals were pending which would have restricted that involvement even further; that the funding of litigation represents but a small fraction of the petitioners' endeavors (Miller Affidavit ¶11, L.F. 20); and that petitioners do not even depend on attorney fee awards to support their activities (*id.*). Under these circumstances, it is difficult to see how preventing petitioners from sharing fees with their staff counsel will have any impact on them at all. Accordingly, fee sharing with staff counsel is in no way "integral" to petitioners' activities, and its prohibition therefore offends no First Amendment values.

Petitioners cannot manufacture a First Amendment violation by advancing hypothetical situations which have no basis in the record. That the prohibitions against fee sharing might have "chilling effects" on other groups or under different circumstances from those present here is of no consequence. Even in free speech cases, where concerns about the chilling of protected expression have given rise to "overbreadth" analysis, this Court has now recognized that petitioners must generally still show that the challenged statute is unconstitutional as applied to them, not merely that it may be interpreted to authorize unconstitutional acts. *Van Zandt v. Thompson*, 839 F.2d 1215, 1218 (7th Cir. 1988), *citing Brockett v. Spokane Arcades, Inc.*, 472 U.S.

491, 501-04, 86 L.Ed. 394, 105 S.Ct. 2794, 2801-02 (1985). As this Court reiterated in *Brockett*, 472 U.S. at 502, 86 L.Ed. at 404, *quoting United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519,

> "* * * one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or situations in which its application might be unconstitutional."

No ruling by this Court supports petitioners' First Amendment argument. In his article on fee sharing, petitioners counsel, Roy Simon has, in fact, acknowledged that "the Supreme Court has never expressly extended First Amendment protection to fee-sharing arrangements with nonprofit groups." "On the contrary," he writes, "the Court has repeatedly refused to decide whether fee-sharing agreements fall within the First Amendment's scope." Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1121 (1989).

In an attempt to give some legitimacy to their claim petitioners cite *In Re Primus*, 436 U.S. 412, 56 L.Ed.2d 417, 98 S.Ct. 1893 (1978), but that decision is not dispositive of any issue in this case. *In Re Primus* did not purport to consider whether a staff attorney could constitutionally be prohibited under state law from sharing court-awarded attorney fees with his lay employer under circumstances analogous to those present here. Unlike the case *sub judice*, there was no showing in *In Re Primus* that the ACLU entities ran afoul of the rules against lay interference in litigation or unauthorized practice of law. The case did not involve a staff attorney. It did not involve the sharing of attorneys fees awarded by a court under 42 U.S.C. § 1988. (At the time of the events giving rise to the case, 42 U.S.C. § 1988 did not even exist.) Indeed, it did not involve fee sharing at all. The only question in the case was whether an ACLU cooperating attorney in South Carolina could be sanctioned for soliciting

clients for litigation to be funded by that organization. Such solicitation has nothing to do with the dispute now before this Court.[6]

Nor can petitioners find support for their position in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 L.Ed.2d 723, 100 S.Ct. 2024 (1980). In a footnote in that decision, this Court did hold that the respondent's representation by attorneys from a public interest group was not a "special circumstance" that would result in denial of counsel fees, 64 L.Ed.2d at 738 n.9, but that is not the issue here. There is no question that a fee award could be made in the case which generated the fees at issue here. The problem posed by this litigation is, instead, who is entitled to retain the fees once they have been awarded, given the legal and ethical prohibitions against fee splitting. This is a problem which this Court neither raised nor addressed in *New York Gaslight Club, Inc., supra.*

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[6] That *In Re Primus* does not support petitioners' position has also now been acknowledged by their counsel Roy Simon. Although petitioners argued before the circuit court that *In Re Primus* "'specifically discussed and disposed of the precise issue here involved — whether the ACLU can sponsor litigation and then keep awarded fees that such litigation generates" (*Memorandum in Support of Plaintiff's [sic] Motion for Summary Judgment*, L. F. 61), Simon reached exactly the opposite conclusion in his article on fee sharing. In that article he stated that "Primus itself did not discuss the fee-sharing rule, and thus left open the precise issues addressed in this Article." Simon, *Fee Sharing Between lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1081 n. 59. Later, Simon likewise observed that "the situation in Primus did not involve fee sharing per se, the state did not charge Ms. Primus with violating the fee-sharing rule, and the Court never mentioned the rule against sharing fees with nonlawyers." *Id.* at 1122. Later still, Simon concluded that "the Primus case did not address the situation of the full-time staff attorney who has agreed to turn over all court-awarded fees to the organization. Primus, therefore, does not definitively establish comprehensive First Amendment protection for fee-sharing arrangements with public interest groups." *Id.* at 1123.

Evans v. Jeff D., 475 U.S. 717, 89 L.Ed.2d 747, 106 St. Ct. 1531 (1986) was not decided until after the fee award here had become final, involved no constitutional question, and adds nothing to this case. The issue in *Evans v. Jeff D.* was whether the district judge had abused his discretion in approving a settlement which called for the waiver by counsel of any claim to statutory attorney fees or costs. In ruling that no abuse of discretion occurred, this Court noted that fee awards under 42 U.S.C. § 1988 may be waived by the client. From this, petitioners reason that if a client has the right to waive a fee entirely, it necessarily follows that he has the unfettered right to dispose of any fees which are awarded however he pleases. This is simply not so. The waiver of fees by a client does not implicate the prohibitions against the unauthorized practice of law by lay persons or lay interference with an attorney's independent professional judgment. The prohibitions against fee sharing do. *National Treasury Employees Union v. U. S. Department of the Treasury*, 656 F.2d 848, 851-52 (D.C. Cir. 1981); *Committee on Professional Ethics v. Lawler*, 342 N.W.2d 486, 488 (Iowa 1984); ABA Informal Opinion 86-1519 (April 18, 1986) WESTLAW DATABASE LS-ABAEO (rule is "protection against encouraging persons not authorized to practice law to engage in the unauthorized practice of law"); *O'Hara v. Ahlgren*, 127 Ill.2d 333, 342, 537 N.E.2d 730, 734 (Ill. 1989); Comment, ABA Model Rules of Professional Conduct Rule 5.4 (1983) ("[t]hese limitations are to protect the lawyer's professional independence of judgment").[7]

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[7] Petitioners cite earlier authorities which advance different reasons for the original prohibitions against fee sharing in an attempt to argue that the prohibitions should not apply here because the reasons for the rule are absent. This argument is completely without merit. The reasons listed here are the ones which are, in fact, advanced in support of the current fee sharing rules, rules which have been retained and modified as groups such have petitioners have appeared on the scene. In any case, the Missouri Supreme Court has

(Footnote 7 continued on next page)

N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963), likewise does not support petitioners' position. Like *In Re Primus*, it involved the constitutionality of solicitation rules, not rules against fee sharing. Moreover, plaintiffs fail to recognize that even under *Primus* and *Button*, the First Amendment would not prevent the state from prohibiting fee sharing with a lay organization where, as here,

(1) that organization exerts control over actual litigation or otherwise interferes with the attorney-client relationship, see *Primus, supra*, 436 U.S. at 439, 56 L.Ed.2d at 439, *citing Button, supra*, 371 U.S. at 447, 9 L.Ed.2d at 426-27, 83 S.Ct. at 345 (White, J., concurring in part and dissenting in part) ("neither the practice of law by [a lay] organization nor its management of the litigation of its members or others is constitutionally protected); see also *Lawline v. American Bar Association*, 738 F. Supp. 288, 296 (N.D. Ill. 1990) (ABA Model Code prohibitions on aiding nonlawyers in the unauthorized practice of law do not violate any First Amendment guarantees) or

(2) a conflict of interest may exist between the lay organization and the party to whom funds are being furnished for litigation, *Button, supra*, 371 U.S. at 443, 9 L.Ed.2d at 424; *Primus, supra*, 436 U.S. at 436, 56 L.Ed.2d at 437.

Petitioners protest that they never actually asserted control over litigation or interfered with the attorney-client relationship. This is false. The undisputed evidence established exactly the opposite. Even in the case which gave rise to the disputed fees here, there was trouble with lay interference when, for example,

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(Foonote 7 continued)

squarely held that the state fee sharing prohibitions do apply under the circumstances present here, and this Court must accept its construction of the law. *Kingsley Corp. v. Regents of University of N.Y.*, 360 U.S. 684, 688, 3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362 (1959).

the time came to order transcripts for the appeal. (Miller Deposition, p. 52.)

Petitioners likewise cannot deny that conflicts of interest have arisen between petitioners and the individuals whose causes they purport to champion. The existence of such a conflict was recently observed by Justice Welliver of the Missouri Supreme Court in his dissenting opinion in *State v. Walsh*, 713 S.W.2d 508, 513-14 (Mo. *en banc* 1986), when he wrote: "I fear that respondent is more hurt than helped by his friends, the amici [including the ACLU/EM], who I believe are more interested in establishing constitutional protections for homosexuals than in securing the freedom of this individual . . ."

The problem of a conflict of interest was also reflected in the retainer agreement in the very litigation which generated the fees at issue here. That agreement expressly provided that the ACLU/EM could terminate its involvement in the case at any time if, *inter alia*, "representation of [D.C.'s] interests require[d] taking an anti-civil liberties position" or "a conflict of interest [arose]." (Plaintiffs' Deposition Exhibit 3 at 3-2.) No limitation was placed as to when this right of termination could be exercised, and no consideration was made by petitioners for the prejudice which such termination might work on the rights of the client.

Petitioners also overlook that proof of actual lay control or interference is not required, nor is proof of an actual conflict of interest. Even under *Primus*, 436 U.S. at 436, 56 L.Ed.2d at 437, all that is necessary is that there be proof of a "serious danger" of conflict of interest or of organizational interference with the conduct of litigation.

Petitioners cannot seriously dispute that such a "serious danger" existed here, given the undisputed facts that:

(1) the ACLU/EM board expressly authorized the lay executive director to exercise direct supervision and control over respondent, the staff attorney, and she exercised that control

(Miller Affidavit ¶ 8, L.F. 19, Miller Deposition, p. 50; Defendant's Deposition Exhibit A, p. A-4);

(2) only the lay executive director and the lay treasurer had authority to issue checks to pay for litigation expenses, and litigation costs and expenses in excess of $500 required the lay executive director's express prior approval (Miller Affidavit ¶¶ 18-21, L.F. 21-22);

(3) the ACLU/EM board exercised the right to reject settlement offers, even where settlement was recommended by counsel for the client (Miller Affidavit ¶46, L.F. 29; Miller Deposition, p. 50);

(4) the lay executive director, on at least one occasion, personally undertook to negotiate a settlement of a pending case with the opposing side and their attorney (Miller Affidavit ¶ 44, L.F. 28; Miller Deposition, p. 49; L.F. 33-35);

(5) the ACLU/EM expressly reserved the right to terminate support for a case at any time if, as noted above, representation of a client's interests required taking an "anti-civil liberties position" or a "conflict of interest arose," (Plaintiffs' Deposition Exhibit 3 at 3-2), and it did, in fact, exercise that right at least once when it disagreed with counsel and the clients as to how the case should be handled (Miller Affidavit ¶ 47, L.F. 29); and

(6) the ACLU/EM had a direct financial incentive to compromise a client's claim in order to secure a fee award in that any attorney fees paid over to the ACLU/EM in cases it supported would directly enrich the association's general coffers and could be used for any purpose (Miller Affidavit ¶ 27, L.F. 23-24), including, *e.g.*, paying rent, utilities, and even overdue catering bills. Those fees did not have to be and were not placed in any separate fund for litigation. No such fund existed. (Miller Affidavit ¶¶ 15, 16, L.F. 21.)

For these reasons, this is not a case where the First Amendment is implicated at all. Even if it were, however, petitioners' First Amendment analysis would still fail. Petitioners have suggested, for example, that the legal and ethical prohibitions against fee sharing are overbroad. Overbreadth analysis, however, is involved where a statute is claimed to be facially invalid, a claim which petitioners' here have not made.

In any case, there is no authority for such a characterization in this case, and even if there were, it would not matter. While Justice Brennan alluded to the overbreadth doctrine in his majority opinion in *Button, supra*, 371 U.S. at 433, 9 L.Ed.2d at 418, mere overbreadth is no longer sufficient to justify invalidating a statute on its face. Before a statute will be declared invalid on its face under the First Amendment, this Court now requires that the overbreadth be *substantial*. *Brockett, supra*, 472 U.S. at 503-04, 86 L.Ed.2d at 405-06. Petitioners have never claimed or established substantial overbreadth here.

There is another reason why *N.A.A.C.P. v. Button* is of no help to petitioners. The solicitation statute struck down in that case was not content neutral. As Justice Douglas noted in his concurring opinion, the statute at issue in that case was specifically enacted as part of a massive plan to thwart the N.A.A.C.P. and others in their efforts to integrate the public schools. 371 U.S. at 445-46, 9 L.Ed.2d at 425-26. No similar situation is present here. There is no dispute that the legal and ethical prohibitions against fee sharing, in their promulgation and application, have nothing whatever to do with the particular views petitioners or anyone else might wish to convey. Those prohibitions, by definition, are therefore content neutral. As this Court recently held in *Ward v. Rock Against Racism*, 491 U.S. 781, 105 L.Ed.2d 661, 675, 109 S.Ct. 2746 (1989):

> "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of

> speech because of disagreement with the message it conveys. [Citation.] * * * A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [Citation.]"

Because the legal and ethical prohibitions against fee sharing are content neutral, they need not serve a compelling state interest in order to withstand First Amendment scrutiny. All that is required is that they further a substantial state interest. Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 Harv. L. Rev. 1904, 1906 (1989); *Ward v. Rock Against Racism, supra*, 105 L.Ed.2d at 678-79. This Court has long recognized that the state has a substantial interest in regulating the practice of law, *Sperry v. Florida*, 373 U.S. 379, 383, 10 L.Ed.2d 428, 433, 83 S.Ct. 1322 (1963), and, as previously discussed, the fee-sharing prohibitions serve this interest by helping to prevent the unauthorized practice of law and by protecting a lawyer's independent professional judgment from lay interference.

Petitioners nevertheless seem to suggest that the legal and ethical prohibitions against fee sharing should be swept aside because there are less restrictive alternatives for accomplishing the same ends. Specifically, petitioners appear to argue that the goals of preventing the unauthorized practice of law and protecting a lawyer's professional judgment can be adequately achieved by enforcing specific provisions of the Rules of Professional Conduct which deal with those matters (see Rules 1.8 and 5.4(c) of Missouri Supreme Court Rule 4) and that the additional prohibition against fee sharing is unnecessary. There is no basis for this claim.

Petitioners have not cited, and respondent cannot find, a single instance in which any state has found it sufficient to simply prohibit the unauthorized practice of law or to outlaw lay interference in litigation without also banning fee sharing. The

considered judgment of state bar authorities, courts, and legislatures appears to be in complete accord on this point. The prohibition against fee sharing is not simply some useless appendage. To the contrary, it is precisely what makes the ban against the unauthorized practice of law and the prohibition against interference with a lawyer's judgment work. If any of these rules are indispensable, it is this one.

But there is a more basic flaw in petitioners' argument: "less restrictive alternative analysis" does not even apply here. Under present Supreme Court jurisprudence, the prohibitions must be narrowly tailored to serve the government's legitimate content-neutral interests, but they need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved *less effectively* absent the regulation. *Ward v. Rock Against Racism*, 105 L.Ed.2d at 679-80. There can be no serious dispute that the challenged prohibitions against fee sharing satisfy this standard. Petitioners' First Amendment challenge was therefore properly rejected.

IV. The Missouri Supreme Court's decision is not likely to have any impact beyond this immediate dispute.

In the proceedings below, petitioners adduced no evidence which suggested that the court's decision will affect anyone other than the immediate parties to this proceeding. There was certainly no proof that it will adversely affect other ACLU affiliates. Based on the reported decisions, the issue of fee sharing between those affiliates and their staff attorneys has evidently not had to be pressed anywhere else, and given the national ACLU's admonition to the affiliates to restructure their legal programs, there is no reason to believe that it may arise in the future.

The challenged decision of the Missouri Supreme Court does not purport to address the validity of any fee-sharing arrangements save the one between petitioners and their staff counsel. As this brief has repeatedly noted, however, petitioners no longer have a staff counsel, they have not had one since the summer of 1985, and they have never claimed that they might wish to have one in the future. Moreover, there are no further cases pending in which respondent stands to receive court-awarded fees for work he performed while in the ACLU/EM's employ. For petitioners here, the sweeping constitutional issues presented are thus entirely academic. Their only loss is a one-time money judgment of $ 8,090.25. In the end, that is all this case is about.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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